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NO. 01-1326

IN THE SUPREME COURT OF THE UNITED STATES

JAMES J. KRIVACSKA,
Petitioner,

– against –

NEW JERSEY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER IT VIOLATES A DEFENDANT'S CONFRONTATION AND DUE PROCESS RIGHTS FOR A STATE COURT TO ADMIT UNCORROBORATED ACCUSATIONS OF CHILD SEX ABUSE FROM CHILDREN PRODUCED THROUGH HIGHLY SUGGESTIVE INTERROGATION PROCEDURES.

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NJSA 2C:24-4a

Scientific Research Literature and Authority

Bruck, Ceci, Francoeur & Barr, "I Hardly Cried When I Got My Shot!": Influencing Children's Reports About a Visit to Their Pediatrician. *Child Development*, 66, 193-208 (1995) 27, 28

Bruck, Ceci, Hembrook, "Children's Reports of Pleasant and Unpleasant Events", in Read and Lindsay (ed.) *Recollections of Trauma: Scientific Research and Clinical Practice*. Plenum Press (New York: 1997) 27, 28

Ceci, S.J. & Bruck, M., *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*. American Psychological Association Press: Washington, D.C. (1995) 14, 16

Ceci, Crotteau-Huffman, et al., "Repeatedly Thinking About Non-Events" *Consciousness & Cognition*, 3, 388-407 (1994a) 27

Ceci, Loftus, et al., "The Role of Source Misattributions in the Creation of False Beliefs Among Preschoolers." *International Journal of Clinical and Experimental Hypnosis*, 62, 304-320 (1994b) 27

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Decision of New Jersey Appellate Division denying appeal. *State v. Krivacska*, 341 N.J. Super. 1; 775 A.2d 6 (2001) A45

OPINION BELOW

Petitioner's appeal was denied by the Superior Court of New Jersey, Appellate Division. Appended at A2-A45

JURISDICTION

On October 9, 2001, the New Jersey Supreme Court denied petitioner's application for certification. Appended at A2

This petition for certiorari on direct appeal is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. An extension of time to file this Petition, to and including March 9, 2002, was granted by the Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution, provides:

No person shall ... be deprived of life, liberty, or property, without due process of law.

Amendment VI, United States Constitution, provides:

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....

Amendment XIV, United States Constitution, provides:

... nor shall any state deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

This Court has consistently ruled that convictions obtained through the use of unreliable evidence are unconstitutional. The Court has recognized that the reliability of evidence admitted against a criminal defendant is the linchpin of due process. Accordingly, convictions obtained through suggestion-induced identification testimony or out-of-court statements devoid of reliability – obtained through suggestive or coercive means – are unconstitutional. Concern for reliability of evidence bears directly on the ultimate issue in a trial. Unreliable evidence can produce only an unreliable outcome. Thus, the Constitution cannot tolerate conviction by unreliable evidence.

In this case, petitioner Krivacska, the clinical director of a school for children with special needs, was convicted of molesting two severely mentally disabled students. The conviction rests entirely on unreliable evidence. Krivacska was convicted by the claims extracted from the child complainants through methods proven to corrupt children's memory and recall ability and taint their resulting reports.

Accordingly, this case presents the issue of whether the Constitution's Due Process and Confrontation Clauses can tolerate a conviction built solely on suggestion-induced accusations, presented through direct and hearsay testimony.

Relevant Facts Regarding the Production of Accusations

The complainants in this case, TA and MB, have serious mental handicaps. Their I.Q.s are in the 50 to 60 range. MB also suffers from Fragile X Syndrome. A state expert who

evaluated them found that they are highly suggestible and susceptible to influence. (T. 181-82,193-94, 9/15/98; Db8-9, 21-23[1])

TA's teacher asked petitioner, a psychologist and the clinical director of the school, to teach TA, individually, about sex and the changes puberty was causing in his body, including erections. The teacher was concerned because TA was getting erections in class and becoming flustered. (T. 182-185, 190-97, 9/16/98; Da402-03, Da419)

Shortly thereafter, TA moved to Florida where he lived with his Aunt Jennifer and spent weekends with his Aunt Carol and Uncle Clarence. (T. 148, 9/10/98) Carol, a "psych nurse" who worked with child sex offenders, regularly asked her children and TA whether anyone had touched their private parts. (T. 146, 152, 98-99, 9/10/98; Da343-44) She focused her inquiry on TA because she felt he was "vulnerable" and "men will prey on boys like [TA]." (T.152,9/10/98; Da343-44)

When Aunt Jennifer told Carol that TA masturbated often (T. 148-49, 156-58, 9/10/98), Carol and Uncle Clarence confronted TA. According to Carol, Clarence told TA, "...this is something someone had to teach you..." (Da342) TA became so upset that Clarence had to leave the room. (T. 150-51, 9/10/98) Carol described her own questioning of TA. She said that she told the boy:

if you tell me this...nobody is going to bother you. You

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[1]"Db" refers to defendant/appellant's New Jersey Appellate Division brief. "T" refers to state court transcripts. "Da" refers to defendant/appellant's state court Appendix.

need to let us know if anybody has touched you in your private parts or had you do something against your will....

(Da342) TA testified at trial that he told Aunt Carol that he had never been touched. He explained also that Carol would not accept this answer. TA said:

> And then she says: Are you sure? And I says, yes. She says: Have anybody touched you? And then I said, all right. And then *she finally got out of me after she asked me hundred times, hundred times asking me*, and I said okay. (T. 53, 9/10/98) (emphasis added).

Carol also said she:

> asked him specifically, "Did he put his mouth on you? Did you put your mouth on him?"...And I kept asking him did he put his mouth on you? And [TA] said, "No. No." (Da155)

As TA and Aunt Carol discussed this "at various times," she continued to "encourage [TA] with the word of God." (T. 171, 9/10/98) Once she elicited accusations from TA, Carol reported them to the New Jersey police.

Monmouth County New Jersey Det. Mason arranged for TA to be interviewed in Florida by Florida Det. Blesso-Chiota. The transcript of that interview reveals that many claims TA made in his trial testimony were first elicited by Blesso-Chiota, whose methods, the state's expert witness conceded, were comprised of "many leading questions." (T. 122, 131, 9/4/97; *see* Db15-17) Blesso-Chiota's interview also reveals Aunt Carol's influence, as some of the claims elicited by the detective were in Carol's words and phrasing. (Da327)

Krivacska first met with MB when MB spontaneously told several people at school that his "heinie hurt" because his cousin Joseph had put his penis in it. (T. 46, 9/15/98; T. 154, 9/16/98) Long after this story was determined to be false, MB continued to spontaneously repeat it. (Db24-25) He also perserverated on heinies, which the state conceded was "part of his syndrome." (T. 155, 9/16/98; T. 123, 9/17/98)

Thereafter, Krivacska saw MB at his teachers' request, for behavioral problems. (T. 146-148, 222, 9/16/98) Months after TA's allegations, MB told his grandmother he had something to tell her about "Dr. Jim." She asked "what Dr. Jim did," and he said Dr. Jim had touched his "heinie" and played with his "pee-pee." (T. 94-96, 9/10/97; T. 82, 121, 9/15/98; Da438-39)

Det. Mason, familiar with the allegations elicited from TA, interviewed MB, on a "question and answer basis," with his parents and grandmother present. (T. 8, 1/26/96; T. 18, 33-34, 9/10/98) Despite an earlier ruling in *State v. Michaels*, 642 A.2d 1372 (NJ 1994), noting constitutional violations arising from suggestive questioning of children and urging recording of interviews, Mason refused to tape his interview of MB. (T. 7-8, 1/26/96; T. 30, 9/10/98). A DYFS report of that interview states that Mason elicited from MB his first claim that Krivacska "tried to put his 'pee-pee' in [MB's] heiney." MB also reported in that interview that Krivacska "was his best buddy," and "never hurt him." (Da432) In later accounts, MB sometimes alleged anal penetration, but sometimes did not. (Db30-32)

An alleged verbatim record of the interview created by Mason indicates that Mason began the interview by telling MB that he was going to ask about "incidents that have occurred at [school] where you were touched by an individual

known to you as Dr. Jim."[2] He then asked MB about "incidents where you were touched by Dr. Jim." (Da425-426) Experts for both sides agreed that Mason's questions were "very leading" and "suggestive."(T. 63, 9/4/97; T. 64-67, 8/28/97; Db28-29) Mason also conceded that MB's parents and grandmother "may have" assisted in eliciting accusations during that interview. (T. 42-43, 9/10/98)

In the years before trial, TA's and MB's families discussed the case at length with them. TA and MB indicated awareness that their relatives were angry at petitioner. (Db30-31, 45-46)

Experts for the state and the defense agreed that methods used to elicit accusations from the children had been revealed by social science literature to be sufficiently suggestive to taint children's ability to make accurate reports. (T.101-05, 122-24,128-31,150-54, 9/4/97; Db37-49,61)

With regard to TA, Krivacska was charged with aggravated sexual assault, first degree (NJSA 2C:14-2a(2)); endangering the welfare of a child, second degree (NJSA 2C:24-4a); and aggravated criminal sexual contact, third degree (NJSA 2C:14-3a).

With regard to MB, Krivacska was charged with aggravated sexual assault, first degree (NJSA 2C:14-2a(2)); sexual assault, second degree, (NJSA 2C:14-2b); aggravated criminal sexual contact, third degree (NJSA 2C:14-3a); endangering the welfare of a child, second degree (NJSA

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[2]Mason's 7 page statement is the only record of the 4 hours of interrogation at the police station that day. (Db 27)

2C:24-4a).

Following a jury trial, Krivacska was convicted of two counts of endangering the welfare of a child, second degree; two counts of aggravated criminal sexual contact, third degree; and a single count of aggravated sexual assault, first degree.

Krivacska is currently serving a sentence of 26 years of incarceration.

The Issue Presented Herein Was Raised and Preserved in State Court

The issue presented herein was raised in the trial court. A pretrial motion to preclude the children from testifying about claims elicited from them through suggestive questioning was denied. (Da272) With regard to the state's use of unreliable hearsay, prior to trial the state promised that it would not rely on hearsay. (T. 29-31, 9/10/98) In opening statements, however, the prosecutor repeated several out-of-court statements elicited from TA and MB. (T.15-19,23-25,9/10/98) In response to defense objection, the state promised it wouldn't elicit these statements from its witnesses. A motion for a mistrial was denied. (T. 32, 9/10/98) The state then elicited from its witnesses the out-of-court statements elicited from MB and TA. (*E.g.*, T. 24-25, 28-29,80-82,121, 9/15/98; T. 151-52) Thus the errors of the admission of unreliable, suggestion induced direct and hearsay testimony were raised on direct appeal to the New Jersey Courts.

REASON FOR GRANTING CERTIORARI

KRIVACSKA'S DUE PROCESS AND CONFRONTATION CLAUSE RIGHTS WERE VIOLATED WHEN THE STATE COURT ADMITTED UNCORROBORATED ACCUSATIONS OF CHILD SEX ABUSE PRODUCED FROM THE CHILD COMPLAINANTS THROUGH HIGHLY SUGGESTIVE INTERROGATION PROCEDURES.

A. Conviction By Unreliable Suggestion-Induced Testimony Violates A Defendant's Due Process and Confrontation Clause Rights.

1. To Be Admissible, Evidence Must Be Reliable.

This Court has long recognized that the use of coercion or suggestion to elicit testimony can taint witness' statements, rendering them unreliable. Accordingly, conviction by evidence elicited through suggestive means violates Federal Due Process and Confrontation Clause protections.

In *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926 (1967), the Court considered the effects of suggestion on a witness' testimony about identification of suspects. The Court recognized that pretrial identification procedures are "peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Wade*, 388 U.S. at 229, 87 S.Ct. at 1933. Simply, suggestion applied to a witness can undermine accuracy of a resulting identification, rendering it constitutionally unreliable.

The *Wade* Court also recognized that the effect of

suggestion may be long-lasting, if not irremediable because:

> once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may...for all practical purposes be determined there and then [at the line-up], before the trial.

And, because a witness exposed to a suggestive identification proceeding becomes so confident in the identification, cross-examination may be an insufficient mechanism to ensure "accuracy and reliability" of identification testimony. *Wade*, 388 U.S. at 235-236, 87 U.S. at 1937-1938.

Thus, the *Wade* Court recognized the violation of the Confrontation Clause, as well as Due Process rights caused by the use of suggestion to elicit identification testimony. *See also*, *Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127 (1969) ("suggestive elements" of identification procedure "so undermined the reliability of the eyewitness identification as to violate due process" though there was trial testimony corroborating the identification).[3]

This Court has also recognized the constitutional violation resulting from prosecution by unreliable hearsay testimony.

In *Idaho v. Wright*, 497 U.S. 805, 814, 110 S.Ct. 3139

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[3]*See, e.g., Neil v. Biggers* , 409 U.S. 188, 196-197, 93 S.Ct. 375, 380 (1972)(collecting Supreme Court cases condemning suggestive identifications); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967)(identification procedure can be so suggestive and conducive to irreparable mistaken identification as to deny Due Process of law).

(1990), for example, the Court found that the defendant's constitutional rights were violated by the admission of out-of-court statements obtained from the child complainant by a pediatrician. The Court found that mild encouragement offered by the doctor (four questions) rendered the girl's statements unreliable because the circumstances in which the statements were elicited were devoid of guarantees of trustworthiness required to establish the reliability of the declarant's statements. *Id,* 497 U.S. at 827.[4] The *Wright* Court also found that conviction by unreliable hearsay evidence violates Confrontation Clause rights. *Id*, at 814.

Accordingly, when there is evidence that testimony was secured through suggestive means, the admission of that testimony violates Due Process and Confrontation Clause rights unless the proponent of the evidence can show it is reliable; that it was not tainted by the suggestive methods used to secure it. *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243 (1976). This is so because the admission of unreliable evidence violates a defendant's Due Process rights. *Manson, supra, Wright, supra, Watkins v. Sowders*, 449 U.S. 341, 101 S.Ct. 654 (1981).

2. Evaluation of the Reliability of Testimony Secured Through Suggestive Means Must Be Based on Objective Criteria.

To determine whether identification testimony has been

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[4] *White v. Illinois* 502 U.S. 346, 112 S.Ct. 736 (1992)(Sixth Amendment requires guarantees of trustworthiness); *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2539 (1980); *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056 (1986).

rendered unreliable by suggestive procedures, the Court has looked to the circumstances surrounding the identification process *prior to* the suggestion. Thus, an objective assessment of the integrity of an identification is critical. *Manson, supra*, *Neil, supra*.

In *Neil, supra*, the Court set out factors as a guide for determining whether under the "totality of the circumstances" an identification obtained through a suggestive process possesses sufficient indicia of reliability. The factors include (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Neil,* 409 U.S. at 199-200.

The overarching characteristics of the *Neil* factors are their objective focus on the process through which the identification is produced.[5]

Specifically, when the proponent of the evidence can show that the witness has had an opportunity to view the criminal at the time of the crime, viewed that person with a high degree of attention, and provided a description of the criminal matching the person identified subsequent to a suggestive confrontation proceeding, there are indicia that the identification itself was not affected by the suggestive process. Likewise, the length of

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[5]We do not argue that *Neil* factors are absolute or that a reliability inquiry can be made only based on those particular factors. Rather, it is the common characteristic of the *Neil* factors – the focus on objective factors – that is required.

time between the crime and the confrontation bears on the certainty of the witness at the confrontation. This is because with time, it becomes more difficult for the witness to be certain of his or her memory, and thus more prone to suggestion. Overall, these factors require indicia that prior to the suggestion, the witness was able to, and did, provide evidence of the identity of the perpetrator of the crime.

The same is true for the reliability assessment conducted to assess the admissibility of out-of-court statements. This Court requires that for hearsay to be admissible, its proponent must show that it bears indicia of reliability. These indicia, the *Idaho v. Wright* Court held, may be determined only through consideration of the circumstances in which the statements were obtained. Only when those circumstances contain "particularized guarantees of trustworthiness," are the out-of-court statements, constitutionally reliable. *Wright*, 497 U.S. at 814. Underscoring the requirement that the process by which statements are obtained is the objective focus of the reliability inquiry – rather than an subjective, credibility assessment of the statements produced – the *Wright* Court held that factors extrinsic to the circumstances in which the statements were obtained may not be considered. *Wright,* 497 U.S. at 820, 822.

Accordingly, the *Neil* and *Wright* analyses require objective criteria for determining whether methods used to secure testimony tainted the testimony. The alternative, a subjective assessment based on credibility of the resulting statements, violates Due Process and Confrontation Clause requirements set out by this Court.

3. This Court's Objective Standard is Necessary to Assess the Constitutional Reliability of Accusations Elicited From Children Through Suggestive Methods.

Just as the Constitution requires that an assessment of reliability in identification and hearsay cases requires objective criteria based on the process used to obtain statements, an evaluation of the reliability of accusations elicited from children through suggestive interviews requires an objective assessment.

Fortunately, there exists a substantial body of scientific research literature concerning the effects of suggestive interviews on children's memory and recall ability. This research, explained below, shows that certain kinds of questioning methods have the capacity to cause children to make reports that are based not in reality, but in suggestions imposed by interviewers and even in biases held by the interviewers that are not explicit in questions asked.

The research also reveals that, just as with suggestive identifications, reports wholly the product of suggestion contain all of the characteristics of accurate reports. That is, there is no way to distinguish between entirely false reports produced through suggestion and accurate reports. (fn 7, *infra*)

This research is accepted by the relevant scientific community and its conclusions are the result of strict adherence to the scientific method. The research is uncontroverted by the scientific community. Hence, it satisfies reliability requirements under standards of *Frye v. United States*, 293 F. 1013 (1923) or *Daubert v. Merrell Dow*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

An objective analysis must recognize that once a child has been subjected to the types of suggestion proven to have the capacity of corrupting a child's ability to make accurate reports one cannot determine the reliability of the post-suggestion report through a subjective assessment of the child's post-suggestive questioning report. This is because there is nothing in a child's post-suggestive interview report that can distinguish its accuracy. This is the same reality that the Court recognized with the "totality of the circumstances" analysis set out in the identification and hearsay cases. *Wade, supra*, *Manson, supra, Wright, supra.*

Because there is nothing in post-suggestion reports from which accuracy or reliability can be assessed, the focus of the inquiry must look, as it does in identification and hearsay cases, for guarantees of trustworthiness in the circumstances in which the statements were obtained.

According to the constitutional standards established by this Court, the indicia of reliability of a child's report – once the child has been subjected to suggestive questioning – must be found in the child's pre-suggestion reports and statements (or in corroborating evidence that can be established to be reliable, such as medical evidence, eyewitnesses, or a confession). The totality of the scientific knowledge in this area supports this requirement and standard.

B. The Scientific Research Literature.

The scientific research literature developed since the late 1980s proves that certain types of interview tactics cause children to make false, though seemingly accurate, reports. This research literature is based on experiments simulating the

conditions of interviews like those in this case.[6]

Interview characteristics proven by these studies to cause inaccurate and unreliable reports include:

1) interviewer bias about the child's experience, *i.e.*, a preconceived hypothesis about the child's experience (not necessarily toward a particular person), manages to permeate the interview often without the intent or knowledge of the interviewer;

2) use of specific or "forced choice" questions, that provide a child with a choice of possible occurrences from which he must choose, thus presuming an occurrence of an event and foisting it on the child;

3) repeating questions when an answer is contrary to interviewer bias, thus rejecting the child's initial report and requiring that he change it to comport with the interviewer's preconceived belief;

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[6]For a review of the research, *see*, Ceci, S.J. & Bruck, M., *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony.* American Psychological Assn. Press: Washington, D.C. (1995). Ceci and Bruck were acknowledged by both parties in this case to be authoritative experts on the effects of suggestion on children's ability to make accurate reports. (T. 33, et seq., 9/4/97) Further, they were part of an amicus group that submitted a brief to the state courts documenting the use of suggestive means to elicit the accusations against Krivacska and explaining the corrupting effects those methods have been proven to have on children's reports. The state courts refused to consider the amicus briefs.

4) repeating interviews, thus compounding the amount of suggestion and bias inflicted on the child;

5) stereotype induction or vilification influences the child with the interviewer's preconception that a suspect is bad, has done bad things, or must be punished;

6) use of praise to encourage reports consistent with interviewer bias and punishment to reject inconsistent reports provides incentives for reports consistent with the interviewer's preconceived beliefs;

7) and use of multiple interviewers and interviewers of high status, thus, multiplying the amount of suggestion applied and impressing the child with the power of the interviewer.

(*See, e.g.*, Ceci & Bruck, *supra,* fn 6)

Other studies reveal that inaccurate reports produced through suggestion are indistinguishable from accurate ones.[7]

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[7]*See, e.g.,* Leichtman, & Ceci, (1995), *The Effects of Stereotypes and Suggestions on Preschoolers' Reports,* Developmental Psychology, 31: 568-578; Realmuto, Jensen and Wescoe, "Specificity and Sensitivity of Sexually Anatomically Correct Dolls in Substantiating Abuse: a Pilot Study," Journal of the American Academy of Child and Adolescent Psychiatry, 29(5), 743-746 (1990); Horner, Guyer and Kalter, "Clinical Expertise and the Assessment of Child Sexual Abuse," Journal of the American Academy of Child and Adolescent Psychiatry, 32, 925-931 (1993); Horner, et al., "Biases of Child Sexual Abuse Experts: Believing Is Seeing," Bulletin of the American Academy of Psychiatry and Law, 21, 281-292 (1993)(well-trained professionals cannot reliably

That is, once a child has been subjected to suggestive and coercive tactics there is no way to determine – from the child's report, demeanor, or affect – whether a report is accurate or a reflection of interviewer bias and suggestion.

The body of research literature in this area continues to grow. Every year, additional studies are published that reinforce the literature. Recent literature also reveals that children's memory and recall abilities are corrupted through far less, and more subtle forms of, suggestion than was originally thought capable of tainting reports. *E.g.*, Garven, et al., "More than suggestion: Consequences of the interviewing techniques from the McMartin preschool case" (1998)(single 10 minute interview applying multiple suggestive methods is capable of inducing inaccurate reports).

In sum, the research shows that once children are subjected to these, and other, tactics, there is no way to determine whether the reports are a reflection of actual experience or of interviewer bias and suggestion.

C. The Accusations Against Krivacska Were Elicited Through The Methods Proven Capable of Corrupting The Memory And Recall Ability Of Children.

Experts for both sides agreed in their reports and pretrial hearing testimony that TA and MB are highly prone to suggestion and that the questioning that elicited accusations from them included many of the suggestive methods known to produce unreliable reports. (Db37-49) Further, the record of

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differentiate true from false reports even when provided with extensive background information about case).

the production of accusations against Krivacska is replete with the suggestive tactics known to produce false reports. These are examples:

Interviewer Bias: Before TA ever mentioned Krivacska, Aunt Carol believed he was vulnerable to sexual abuse, that his masturbation was not normal, must have been taught to him and that whoever taught him must have molested him. (T. 157-58, 9/10/98) She often asked TA whether he had been abused. (T. 152, 9/10/98) The state expert conceded that Carol was "predisposed to believe that something inappropriate had occurred," that "his aunt Carol... communicated a bias to him," and that the result was a "substantial likelihood" that TA's accusations were tainted. (T. 56, 99-103, 105-106, 9/4/97; Da187)

Before any accusation was elicited from MB, his family knew of Krivacska's acquittal on charges of sexual abuse made by another student years earlier. Their bias against Krivacska was revealed in their demand of the school director that Krivacska and MB never be alone together. (T. 133-134, 9/15/98) The state expert conceded that det. Mason's questioning of MB – the origin of MB's specific accusations – revealed Mason's attempts to validate his own theory of guilt. (T. 154, 9/4/97)

Specific or "Forced Choice" Questions Suggesting Information: Aunt Carol revealed her use of specific questions to elicit the initial accusations from TA, stating:

> So I called TA in the room and we closed the door and Clarence began to question him about, you know, *this is something somebody had to teach you*. Did anybody teach you this?(Da342)

TA recalled Carol telling him that someone had to teach him to masturbate. (Tr. 90, 9/10/98) Carol also injected the first mention of oral sex into her sessions with TA through "specific questions and specific concerns...specifically about that." (T. 172-173,177, 9/10/98; Da 155)

Det. Blesso-Chiota, used specific questions that provided TA with accusations and detail. She injected into TA's account the first mention of molestation in Krivacska's office. Prior to that, in response to Aunt Carol's questioning, TA said molestation occurred in the school auditorium. TA amended his accusations to reflect the suggestion offered by Blesso-Chiota. The detective also introduced the notion that the office door was closed and locked when TA was there. TA adopted this suggestion too. In fact, witnesses familiar with the school and Krivacska's office testified that the door was never locked and that teachers entered the office at various times unannounced. (Db7-8, 10, 11)

Other questions suggesting information and possible acts of abuse presented by detective Blesso-Chiota included: "Did he make you touch his wee-wee? And would he tell you how to do that? Did he make you touch it the same way like putting your hand around it and rubbing back and forth?... Would he try to rub his wee-wee against you? Did he rub it against your butt?" (Da319-330) TA adopted these suggestion to varying degrees during the pendency of this case.

Det. Mason used many of these types of questions to elicit accusations from MB. A transcript reveals that Mason began one interview by telling MB it was his "duty to ask... questions regarding the circumstances ...where you were touched by an individual known to you as Dr. Jim....would you please tell us about those incidents? (Da425-426)

Other Mason questions suggesting information included: "Did you ever see Dr. Jim touch his own pee-pee?," "when Dr. Jim touched his pee-pee, would he pull his pants down?," "Did he hurt you when he tried to put his pee-pee in your hiney?," "Did your hiney hurt after Dr. Jim tried to do this?," "Did Dr. Jim put anything on his pee-pee before he tried to put it in your hiney?." (Da. 426)

Prior to the Mason interview, MB said, Krivacska "was his best buddy" and "never hurt him." (Da 432) Following Mason's use of these suggestive questions – and other tactics – MB provided accusations consistent with Mason's suggestions, abandoning his original, spontaneous, statements.

Repeating Questions: TA testified about aunt Carol's repeating questions in pursuit of accusations, stating: "...she finally got out of me after she asked me hundred times [sic], hundred times asking me, and I said okay." (Tr. 53, 9/10/98)

Det. Mason's interview with MB was replete with repeated questions, *supra*. Other examples of repeated questions used to elicit accusations from both complainants can be found in the state court briefs, and in the amicus brief submitted to the state courts.

Repeated Interviews: Aunt Carol acknowledged that she often asked TA about molestation. (T. 152, 9/10/98) After eliciting the first accusation, she continued to question TA about molestation, "encourag[ing] him with the word of God." (T. 167-171, 9/10/98) TA was also interviewed on the telephone by a New Jersey Department of Youth and Family Services (DYFS) worker and then by Blesso-Chiota. Later, TA was interviewed by det. Mason and a prosecutor. He was interviewed by state expert Philip Witt. Finally, at least once

prior to trial, the prosecutor interviewed TA. (T. 70, 9/10/98)

MB was questioned on numerous occasions by his grandmother, his mother, his father, a DYFS official, and det. Mason, twice one day for some four hours. He was interviewed by a civil attorney retained by his parents. A physician examining MB for evidence of abuse also questioned MB, as did state expert witnesses, Dr. Levitas and Dr. Witt. (T. 171, 9/1/98) By the time of trial, MB had also been interviewed again by prosecutors and had appeared at the Grand Jury.

Stereotype Induction, Vilification of Krivacska: Uncle Clarence told TA that masturbation was bad, but that it was Krivacska's fault and what Krivacska did "wasn't right." (Tr. 53, 9/10/97; Tr.85-86, 9/10/98) Aunt Carol told TA that his masturbating made God angry, but it was Krivacska's fault. (Tr. 101, 9/10/98) Carol and Clarence's questioning was so coercive that the state expert was forced to conclude, "it is clear that the first time TA is questioned about what occurred in Krivacska's office, he is given the message that what Krivacska did was wrong...." (Da.188)

Although TA had said nothing to indicate fear of Krivacska, Blesso-Chiota injected into her interview the idea that Krivacska was bad and that TA should be afraid of him. (Da. 323, 326, 333)("did he ever say that he would do something to you if you told anyone?", "did you think he would hurt you if you didn't do what he said?", "do you think you're scared because you've told about it now?")

MB acknowledged that he often heard his parents talking about accusations of molestation of which Krivacska had been exonerated years earlier. (T. 36-39, 51, 9/16/98) MB said he

knew his family was angry with Krivacska and wanted him in jail. (Da214, 242, 243, 246, 255; T.124-26, 8/26/97; T. 33, 9/16/98)

Rewards and Punishments: When they learned he had been masturbating, aunt Carol and uncle Clarence told TA that he was in trouble because, "they thought it was bad...." and that God was angry with him for masturbating. (T. 81,89, 9/10/98) TA's cousin, and a Pastor in the church, told him that masturbating "...was bad and...that God didn't like it when you do that." (T. 82-84, 9/10/98) Carol told TA he would get into trouble for playing with his penis. (Tr. 90, 9/10/98) So powerful were Carol and Clarence's threats that when they interrogated him, TA became "shaky and real nervous and his eyes welled up with tears." But Carol offered a reward in exchange for accusations, telling TA that if he said someone taught him to masturbate "no one would bother him." (T. 101, 162, 9/10/98) The state expert agreed that the suggestion that TA could get out of trouble constituted "coercion." (T. 100, 9/4/97)

The rewards and punishments were not lost on TA. He said that his aunt and uncle's assurance that it was Krivacska (and not TA) who would be in trouble made him feel better. (Tr. 85,86,101, 9/10/98).

Interviews by Adults of High Status and Multiple Interviewers: In addition to being a senior member of his family, aunt Carol was a minister of the church TA attended. (Tr. 72, 86-87 9/10/98) TA was also questioned by uncle Clarence, who was so imposing that Carol had to ask him to leave the room while she questioned TA "because TA was real nervous about him being there." (Tr. 150, 9/10/98) TA's older cousin and pastor at the church, also condemned TA's

masturbation, telling him God didn't like it. (Tr. 156, 9/10/98)

Other adults of high status who questioned TA included, detectives, DYFS workers and psychologists and prosecutors, one of whom TA described as "my lawyer." (Tr. 66, 9/10/98) All of these interviewers presented to TA their assumptions of abuse.

MB was first questioned by his grandmother and parents. Revealing their authority and influence, MB testified that whatever his parents said was true, and anything he said that they had not told him was a lie. (T.37-38, 9/16/98)

Following interviews with his family, det. Mason questioned MB and emphasized his own status:

> I am Detective Lonnie Mason of the Monmouth County Prosecutor's office and present here is Detective Joseph Paglino of the same office, along with... your parents. It is our duty to ask you questions regarding the circumstances surrounding incidents...where you were touched by an individual known to you as Dr. Jim. (Da. 425)

The common theme of all of these types of questions used to elicit accusations from the children is that they have been proven to corrupt children's memory and recall ability, producing inaccurate reports that are indistinguishable from accurate ones.

D. Considering Krivacska's Conviction By Suggestion-Induced Accusations, State Courts Ignored Well-Settled Constitutional Principles.

State experts conceded that the methods used to question

the children in this case included many of the tactics shown to taint children's reports, rendering them unreliable. (T. 56, 60, 62, 63, 66, 97-101, 154, 189-190, 196, 198, 9/4/97; Da187)

According to this Court's decisions, the inquiry in this case must look for indicia of reliability of the statements elicited from the children during and prior to the suggestive questioning. Further, indicia of reliability may be determined only by objective criteria. Subjective impressions gleaned from post-suggestion reports or "common-sense" cannot, the science proves and this Court has recognized, determine reliability of post-suggestion accusations or satisfy constitutional reliability requirements. The state courts ignored this standard.

The state courts' determination that the children's post-suggestion statements were reliable violated Constitutional Due Process and Confrontation protections because: (1) it was rendered and affirmed without consideration of the totality of the circumstances; and (2) it was based on an entirely subjective evaluation invented from whole-cloth by the state's expert that is unsupported by science and disproved by scientific research well prior to this case.

(1) The State Courts Failed To Consider The Totality of the Circumstances.

In its decision on the motion to exclude the children's post-suggestion accusations, the trial court never mentioned any of the above-described methods of suggestion used in the interviews that produced the accusations in this case: interviewer bias, incessantly repeated questions, multiple interviews, multiple interviewers, vilification of Krivacska, absence of control of outside influences, and the failure to

record the interviews. (Da272-82) By ignoring these critical components of the process used to produce and develop the accusations for which Krivacska would be convicted, the trial court grossly minimized the influence to which the children were subjected. The New Jersey appellate courts did nothing to correct this obfuscation of the record.

Accordingly, with this case the state courts have rejected this Court's requirement that the totality of the circumstances must be evaluated.

(2) The State Courts Based The Admission of Post-Suggestion Accusations On Expert Claims That Are Unsupported, And Have Been Disproved By The Scientific Research Literature.

In response to the defense motion to exclude the children's statements for want of reliability, the state employed Dr. Hall, who invented a test for assessing reliability of children's accusations based entirely on subjective criteria, also of her own design.

Hall claimed that by observing the complainants' behavior during the suggestive interviews and resulting report, she could tell that the accusations elicited were not influenced by suggestion. (*E.g.*, Tr. 40,42,51-53,56, 57,64, 70,71,72, 9/4/97) In effect, Hall created a checklist for assessing whether accusations were the product of suggestion.

Hall claimed: (a) because the accusations elicited from the complainants were consistent from the time they were initially elicited through the trial, they were not the product of suggestion (T. 42,55,57,70,72, 9/4/97); (b) because the accusations elicited through suggestive methods contained

details not specifically suggested, they were not tainted by the suggestion used to obtain them (T. 58,69,72, 9/4/97); and (c) because the children did not always include every suggestion imposed upon them, the accusations were not the product of suggestion. (T. 41-42,51-52,64, 167, 172-73, 9/4/97)

The state courts were impressed with Hall's claims – the Appellate Division finding they "would seem to comport with common sense and common experience" – and based their rulings in favor of admission of the suggestion-induced accusations on Hall's checklist. *State v. Krivacska*, 775 A.2d 6, 18-20, 21-23 (N.J. App.Div. 2001). The courts were wrong.

Hall's theories had been rejected by all of the scientific research literature long before she testified.[8]

Hall purported to base her conclusions on the published work of Drs. Stephen Ceci and Maggie Bruck and their colleagues, university researchers universally recognized as authorities in the area of the effects of suggestion on children's memory and recall ability. In fact, Hall's claims were so contrary to the scientific research literature that Ceci and Bruck and a number of their colleagues established an amicus group for the purpose of submitting a brief to the New Jersey courts of appeals in this case to explain the fallacies and falsehoods presented by Hall and to urge the court to rely on scientific knowledge and principles accepted by the scientific community, rather than on idiosyncratic theories that

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[8]It is because the scientific findings contradict "common sense" that it is crucial to base reliability determinations on conclusions based in science rather than on unsupported theories fabricated for a particular case, as Hall's were.

were unsupported, indeed disproved by science. The state courts refused to even consider the brief.

The research shows that once a child is subjected to suggestion or coercion, there is no way to determine that the child's resulting report is accurate and not a wholesale reflection of the suggestion applied. That is, there is nothing in the content of a child's report or the child's affect while making a report that distinguishes an accurate report for one induced by suggestion. (*See* fn 7, *supra*) And, each component of Hall's checklist has been disproved. Specifically:

(a) Inaccurate, suggestion-induced reports are expected to be consistent over time when the suggestive influence and interviewer bias remains consistent -- as in this case. (*See*, fn 6, *supra*) Thus, Hall's claim that consistency of accusations is an indication of reliability is wrong.

(b) Reports produced wholly by suggestion often contain details not expressly suggested by a particular interviewer, but that are consistent with the gist of the interviewer suggestion and bias.[9] Thus, Hall's claim that addition of details – during

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[9]*E.g.*, Ceci, Crotteau-Huffman, et al., "Repeatedly Thinking About Non-Events" Consciousness & Cognition, 3, 388-407 (1994a); Ceci, Loftus, et al., "The Role of Source Misattributions in the Creation of False Beliefs Among Preschoolers." International Journal of Clinical and Experimental Hypnosis, 62, 304-320 (1994b); Bruck, Ceci, et al. , "I Hardly Cried When I Got My Shot!": Influencing Children's Reports About a Visit to Their Pediatrician. Child Development, 66, 193-208 (1995); Bruck, Ceci, Hembrook, "Children's Reports of Pleasant and Unpleasant Events", in Read and Lindsay (ed.) "Recollections of Trauma: Scientific

or following suggestive interviews – that were not specifically suggested is an indication of reliability is wrong.

(c) Children who are induced by suggestion to make reports that are wholly the product of suggestion often fail to adopt every suggestion offered during interviews.[10] Thus, Hall's claim that the children's failure to adopt every suggestion imposed on them is an indication of reliability is wrong. Indeed, MB proved this point at trial when, after a few questions about whether he and TA discussed the case, MB gave a long account of an imaginary conversation with TA, full of detail and even physical demonstrations. (T. 79-88, 9/19/98) During this account MB resisted suggestions and gave details not suggested by questions. Nevertheless, his testimony about that conversation – which indisputably never occurred – was wholly false. (Db51-56)

In fact, an objective reliability determination in this case rests, as it does in identification cases, on the presence and accuracy of accusations prior to the influence inflicted on the children by the interviewers.

Not a single accusation of any kind was made by TA prior to the intervention of his aunt Carol and then other family members and police. Thus, there are no indicia of reliability with regard to TA's accusations.

With regard to MB, months after TA's allegations, MB

Research and Clinical Practice. Plenum Press (New York: 1997).

[10] *E.g.*, Bruck, Ceci, Hembrook (1997), *supra*; Bruck, Ceci, Francoeur & Barr (1995), *supra*.

told his grandmother he had something to say about Krivacska. His grandmother, who had an acknowledged bias against Krivacska, immediately asked "what Dr. Jim did," a question that elicited MB's response that he had touched his "heinie" and played with his "pee-pee." (*Supra*, p. 5) An analysis of the totality of the circumstances in which even this comment was made was never conducted.

The failure to consider the totality of the circumstances and the reliance on Hall's disproved theories is evidence that the state courts failed to address the reliability issue in this case according to the constitutional standards set out by this Court. Further, by affirming the trial court's abandonment of these constitutional standards, the state courts of appeal have signaled their departure from the Constitution's Due Process and Confrontation Clause requirements. The result of this is the violation of Krivacska's constitutional rights and the disregard of those Federal rights by the state courts. The Constitution cannot tolerate either result.

E. The Unreliable, Suggestion-Induced Statements Caused Krivacska's Conviction.

But for the post-suggestion accusations elicited from the children, there is no evidence of guilt in this case. None. There is no physical evidence supporting the allegations. Even claims that should have been corroborated by physical evidence were not. Allegations of semen on Krivacska's office carpet was disproved by tests finding no traces thereof. (T. 28-30, 9/10/98; T. 20, 9/16/98) Not one witness claimed to have seen any abuse or observed any change in TA or MB before or after sessions with Krivacska. Rather, witnesses said neither child exhibited any fear or reluctance to see Krivacska and never appeared upset after their visits. (T. 199, 229, 9/16/98)

Thus, the conviction is based solely on the claims elicited from the children through suggestive means and presented through their direct testimony and hearsay witnesses. For this reason the constitutional error and violations caused by admission of so much unreliable direct and hearsay testimony is not harmless.

CONCLUSION

The adults who questioned the children and prosecuted this case may have been well-meaning. But in their zealous pursuit of accusations, they used methods known to corrupt children's ability to make accurate reports. Justice Brandeis' eloquent observation nearly a century ago is particularly apt:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent...The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

For these reasons, petitioner Krivacska respectfully requests that this Court grant certiorari.

Respectfully submitted,

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Dated: February 28, 2002

APPENDIX

NO.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES J. KRIVACSKA,
Petitioner,

– against –

NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Decision of New Jersey Supreme Court denying petitioner's application for certification A2

Decision of Superior Court of New Jersey, Appellate Division A2

Decision of Superior Court of New Jersey, Appellate Division Denying Petitioner's Direct Appeal

State of New Jersey V. James J. Krivacska, 341 N.J. Super. 1; 775 A.2d 6 (NJ Super.App. Div. 2001)

Before Judges Baime, Carchman and Lintner. The opinion of the court was delivered by BAIME, P.J.A.D.

BAIME, P.J.A.D.

Following a protracted trial, a jury found defendant guilty of one count of aggravated sexual assault (N.J.S.A. 2C:14-2a(2)), two counts of second degree endangering the welfare of a child (N.J.S.A. 2C:24-4a), and two counts of aggravated criminal sexual contact (N.J.S.A. 2C:14-3a). Defendant was acquitted of a second count of aggravated sexual assault. The trial court sentenced defendant to twenty-six years imprisonment under the Sex Offender Act (N.J.S.A. 2C:47-1 to -10). Defendant appeals. We affirm.

I.

Defendant, a licensed psychologist, was the clinical director of the Children's Center of Monmouth County, a school for individuals with special needs. The alleged victims, T.A. and M.B., were students at the school. The charges and resulting convictions stemmed from allegations that defendant sexually abused T.A. and M.B. under the guise of providing treatment for their mental and emotional infirmities. [**12] The allegations were contained in an indictment which charged defendant with sexually abusing M.B., and an accusation which charged defendant with sexually abusing T.A. The

charges were consolidated for the purpose of trial. Our description of the facts is taken from the voluminous trial and motion hearing transcripts.

As clinical director of the Center, defendant had a wide range of responsibilities, including intervention and behavioral counseling and the development of programs and curricula. Defendant's counseling duties often required him to meet with students in private sessions. From 1990 to September 1993, defendant's office was located in Building 5, which was known generally as the "old" building. This office was next to [***3] that of the school's director, George Scheer, and across the main entrance foyer from the office of their secretary, Arlene Kelly. Defendant's office door had a rectangular window and could not be locked because the key [*12] had been lost. Many witnesses testified that this was a highly trafficked area.

In the Autumn of 1993, defendant moved to Building 4, which was known at the time as the "new" building. Defendant's office was perhaps slightly more isolated, but nevertheless was located in close proximity to a supervisor's office, the school store, the school kitchen, and staff and student bathrooms. The office was ground-level with windows looking out into the street. The door had a rectangular window, and a lever handle with an inside button which could be pushed to lock it from the inside.

During the school year 1993-1994, T.A. was a student in Naomi Azar's class in the new building. We will describe T.A.'s mental deficits in detail later in this opinion. It is enough to note here that T.A.'s IQ score was between fifty and sixty, approaching the lowest point that can be measured. At thirteen years old, T.A. was older than the students in his class

and was maturing physically. On [***4] several occasions Azar noticed that T.A. had erections in class, causing him to become nervous and flustered and preventing him from being able to answer simple questions. The problem took on added urgency because in the Spring of that school year, Azar was informed that T.A. was moving to Miami, Florida where he was to be "mainstreamed" into the public school system. Azar referred T.A. to defendant for private counseling sessions.

T.A. would go to and return from defendant's office on his own. If he did not return in an appropriate amount of time, a teacher would go to defendant's office and bring him back. According to T.A.'s testimony, it was at these private sessions that defendant sexually assaulted him. T.A. testified that defendant commonly hung his jacket on the door, covering the rectangular window. T.A. would sit in a regular chair, while defendant would be seated in a chair with wheels. Defendant would instruct T.A. to pull his pants down to mid-thigh, place his hands on T.A.'s penis and "shake" it until T.A. ejaculated. On one occasion, defendant allegedly "put his mouth" on T.A.'s penis. On another, defendant [*13] stood with T.A. facing him and their penises touching. According [***5] to T.A., defendant would show him photographs depicting sexual organs, which he identified on cross-examination as the drawings in a pamphlet, A Kid's First Book About Sex. Defendant would explain to T.A. the sexual organs depicted in the pamphlet.

T.A. recounted that defendant asked him to visit at his house, noting that he did not have a wife or children. T.A. thought it "odd," however, and declined defendant's invitation. Defendant cautioned T.A. never to tell anyone what happened between them. [**13]

T.A. abided by that admonition until he moved to Florida. T.A. initially lived with his Aunt Jennifer. On weekends, T.A. would often visit with his Aunt Carol n1 and his Uncle Clarence. Aunt Carol was employed as a psychiatric nurse. She was also the pastor of her church. It was her habit to ask "all the children" if anyone had touched them inappropriately, or "in a private part." Aunt Carol focused particularly on T.A. because she felt he was "vulnerable." T.A. regularly denied that anyone had touched his private parts.

----------Footnotes----------

n1 For purposes of consistency, we refer to Carol Ruth as "Aunt Carol" throughout the recitation of facts.

----------End Footnotes----------

[***6] In July 1994, Aunt Jennifer told Aunt Carol that T.A. had been masturbating frequently and "hard," so that his bed "shook." Aunt Jennifer was concerned that her own children might hear him. Aunt Carol spoke with Uncle Clarence, who responded that "boys do masturbate and play with themselves, but not as aggressively" as Aunt Jennifer had described. Aunt Carol and Uncle Clarence confronted T.A. about the subject.

Contrary to the statement of facts in defendant's brief, the accounts of that discussion offered by T.A. and Aunt Carol markedly differ. Defendant's recitation is taken primarily from his attorney's cross-examination of T.A. in which T.A. gave essentially one word responses to defense counsel's questions. The character of that cross-examination speaks for itself. We thus quote verbatim from the trial transcript: [*14]

Q. I see, okay. So then your Aunt Carol Ruth came to you and told you that it wasn't good that you were playing with your penis, right?

A. Yes.

Q . And it wasn't good that you were making this stuff come out of it, right?

A. Yes.

Q. And is she also the one that told you that you shouldn't do that any more?
A. Yes.

Q. And that God doesn't like it?

A. Yes. [***7]

Q. Did she tell you that because you were doing that that God was angry at you?

A. Yes. And that was bad.

Q. And that was bad?

A. Yes.

Q. And that because you were doing this you were going to get in trouble, is that right?

A. Yes. Not in much trouble.

Q. Not in much trouble?

A. Yes.

Q. Did she say that, not in much trouble. Why do you say not

in much trouble?

A. Because I didn't do nothing to get in trouble.

Q. Because - well, didn't you say that God didn't like it because you were playing with your penis?

A. Yes.

Q. Okay. And that you would get in trouble for playing with your penis, isn't that right?

A. Yes.

Q. Okay. So did she also say to you that somebody must have taught you how to do this? You remember her saying that?

A. Yes. [**14]

Q. She told you that?

A. She asked me did anybody do this to you before?

Q. Let's just back up for a minute.

A. Okay.

Q. She wanted - isn't it true that she wanted to know where you learned to do this?

A. Yes.

Q. She said that somebody had to teach you to do this, correct? [*15]

A. Yes.

Q. And you told her who taught you to do this, didn't you?

A. Yes.

T.A. testified that Aunt Carol repeatedly asked him whether anyone had touched [***8] his private parts. T.A. claimed that although he initially denied any such activity, he ultimately identified defendant as the perpetrator. According to T.A., "she finally got [it] out of me after she asked me [the same question] a hundred times."

Aunt Carol steadfastly denied that she or Clarence had told T.A. that God would be angry at him for masturbating. She also denied that she or Clarence told T.A. someone must have taught him to masturbate. According to Aunt Carol, she made it clear that masturbation was normal behavior, but that T.A. should engage in that activity only in the privacy of his room or in the shower. Because T.A. appeared nervous with Clarence in the room, Clarence decided at some point to excuse himself. Aunt Carol testified that she asked T.A. whether anyone had taught him to masturbate. After being assured that he would not get into trouble, T.A. identified defendant as the perpetrator.

After that initial disclosure, T.A. initiated several conversations with Aunt Carol, basically repeating what he had told her earlier. According to Aunt Carol, T.A. "would start talking about it when [the two] were together." T.A. told her that the incidents had occurred [***9] in a room which he described. Although initially, Aunt Carol "assumed" that T.A. was referring to a school auditorium, T.A. subsequently

corrected himself and told her that "Dr. Jim would take him to his office." When Aunt Carol questioned him about the subject, T.A. denied that "there was any oral sex."

As a result of T.A.'s disclosures, Aunt Carol contacted Florida authorities. Detective Debra Blesso-Chiota of the Orange County Sheriff's Office interviewed T.A. at Aunt Jennifer's house on August 10, 1994. The interview was audiotaped. However, the tape was subsequently lost. The transcript of the interview discloses that T.A. generally repeated the allegations he had [*16] previously made to Aunt Carol. T.A. told Blesso-Chiota that defendant would show him sexually explicit photographs. According to T.A., he and defendant would "open their pants" and touch each other's private parts. T.A. noted that he and defendant would ejaculate, and clean off their hands with tissues. T.A. added one detail that he had not told Aunt Carol earlier. Specifically, T.A. said that on at least one occasion, defendant had "put his mouth on" T.A.'s penis. T.A. noted that he had been "too scared to tell [his] [***10] aunt."

T.A. apparently repeated these allegations in subsequent interviews with Detective Lonnie Mason of the Monmouth County Prosecutor's office. We have underscored the word "apparently," because these interviews were neither taped nor stenographically recorded. We add that these discussions occurred in the presence of several family members and an assistant prosecutor. T.A. repeated these allegations when questioned by the State's expert, Dr. Philip Witt. The latter interviews also were neither taped nor stenographically recorded. [**15]

T.A.'s interview with the defense's expert, Dr. Ralph Underwager, was videotaped. We have observed the tape.

T.A. appears extremely reluctant to describe his relationship with defendant. He says only that defendant engaged in "gross" activities after showing him pictures, and that he was frightened during these episodes. After a short break, T.A. appears more forthcoming in his description of the incidents, noting that he and defendant would touch each other's private parts and ejaculate.

We now shift to the allegations contained in the indictment. These pertained to M.B. The State and defense experts agreed that M.B.'s mental disabilities were [***11] more severe than T.A.'s. M.B.'s IQ was from 49 to the low 50's, placing him in the moderately retarded range. M.B.'s cognitive impairments are manifestations of a genetic disorder known as "Fragile X Syndrome." This condition presents a distinctive set of symptoms, including mental retardation, echolalia (repeating words or phrases spoken by others), delayed echolalia (repeating words or phrases [*17] spoken by others long after hearing them), and perseveration (fixating on words or phrases for lengthy periods). Persons afflicted with this syndrome tend to be quiescent when facing "confrontational questioning" in order to alleviate stress and anxiety. Moreover, their anxiety thresholds are lower than most people.

M.B. began attending the Center in February 1991, when he was thirteen years old. His classroom was in the "old" building. M.B. was physically and verbally aggressive and very easily agitated. He often "acted out" in the classroom as the result of overstimulation. M.B.'s parents were actively involved in M.B.'s education at the Center. M.B.'s father often conducted his business using an office at the school. On occasion, he would enter the classroom in an attempt to calm M.B.'s [***12] anxiety. M.B.'s mother served as a classroom assistant.

While M.B.'s classroom was in the old building, defendant would conduct private sessions with him in his office. In September 1993, M.B.'s class moved to the new building. M.B. continued to spend time with defendant in defendant's new office, but less than before.

M.B. claimed that defendant sexually assaulted him during these private sessions. According to M.B., defendant would lock the office door, remove his jacket or sweater and hang it on a hook, thus obscuring the view of those in the hallway. M.B. testified that defendant and he touched each other's private parts. After they would ejaculate, defendant would put the "mess" in a paper bag and discard it in a wastepaper basket. M.B. recounted that on one occasion, defendant placed a "paper baggie" over his penis, and attempted to put his penis in M.B.'s "heinie." Defendant warned M.B. not to tell anyone.

During this period, M.B. would "cut up" his underwear when he came home from school. M.B. would also take showers immediately after he arrived home. According to M.B., he was "really angry" at defendant and wanted to "get [him] in trouble," but [*18] nevertheless did not apprise [***13] his parents of defendant's sexual misconduct.

M.B. kept defendant's secret for a long time. On December 30, 1994, M.B.'s grandmother, Joan Ohmott, was babysitting for M.B. and his siblings. At approximately 11:00 p.m., Ohmott found M.B. sitting in the dark, yelling into a toy microphone. Ohmott described M.B.'s demeanor as "upset, mad [and] anxious." M.B. told Ohmott he wanted to tell her something but was afraid she would "get mad at him." At that point, M.B. told Ohmott about defendant's sexual abuse. [**16]

The next morning, Ohmott told M.B.'s mother. M.B. repeated his allegations to his mother, and then to his father. Because of the holidays, M.B.'s parents were unable to contact the Monmouth County Prosecutor's Office until January 3, 1995, when they, Ohmott and M.B. met with Detective Mason. Mason interviewed M.B., his parents, and his grandmother together for approximately one hour. Apparently, an assistant prosecutor and a representative from the Division of Youth and Family Services were also present. M.B. repeated his allegations during this interview. However, the "question and answer" session was not videotaped, audiotaped or otherwise recorded.

Mason then took a seven-page [***14] statement from M.B. The statement was typed as it was being taken. M.B.'s parents were present, and on several occasions interpreted M.B.'s responses. Experts for the prosecution and the defense agreed that Mason's questions were "leading" and "suggestive." He began by telling M.B. that his inquiry concerned "incidents that have occurred at the [Center] where you were touched by an individual known to you as Dr. Jim." After several preliminary questions, Mason asked M.B. about "incidents where you were touched by Dr. Jim." M.B. responded by saying that defendant touched his "heinie" and "played with [his] pee-pee." According to M.B., on one occasion defendant "tried to put his pee-pee in [his] heinie." M.B. related that defendant would lock the door by pushing the button in the door knob and cover the door window with his coat. [*19]

Like T.A., M.B. repeated these allegations in subsequent interviews. Dr. Underwager evaluated M.B. in April and September 1996. The interview was videotaped, and we have had the opportunity to view it. At the very inception of the interview, M.B. volunteered that defendant would lock the

door to his office, hang his coat over the rectangular door window, [***15] and touch his "body parts" and "heinie." M.B. told Underwager that defendant had committed the same acts on T.A. and was "going to be put in jail for the rest of his life." M.B. did not mention touching defendant's penis. Nor did he allege that defendant attempted to have anal intercourse with him.

M.B.'s unrecorded interview with the State's expert, Dr. Witt, produced largely similar results. Witt described M.B. as "eager" to tell him about defendant's sexual acts. According to Witt, "with very little prompting, [M.B.] recounted" what occurred during his private sessions with defendant. M.B.'s description of the incidents was consistent with his earlier accounts. Unlike his interview with Underwager, however, M.B. described in detail defendant's attempt at anal intercourse.

Defendant did not testify at trial. However, the defense presented several witnesses who testified that they had free access to defendant's office. Azar testified that on the occasions when she had to get T.A. from defendant's office, she would "just walk in," whether or not she knocked first. She noted, however, that sometimes there was a sweater or suit jacket hanging over the window of the door. M.B.'s [***16] teacher, Diane Campbell, testified that M.B. always had to be accompanied to and from defendant's office. According to Campbell, she never found the office door locked. She would knock and be granted access immediately.

Defendant also elicited testimony about an incident in February 1991, when M.B. complained at school that his "heinie" hurt because his nine-year old cousin, Joey, had put his penis in M.B.'s rectum. The truth or falsity of this

allegation was never clearly established. Ohmott described an incident in 1990 when she noticed that Joey [**17] and M.B. were in a bedroom with the door shut. [*20] Because the bedroom was very quiet, Ohmott decided to investigate. She found the boys alone with their penises exposed. Ohmott dismissed the incident because the children had been alone for only a short period of time.

It is against this factual backdrop that defendant appeals the judgment encompassing the jury's verdict. Defendant argues: (1) the coercive and suggestive interview techniques rendered the testimony of T.A. and M.B. unreliable and inadmissible, (2) the grand jury proceedings were tainted by Detective Mason's inaccurate statement, (3) the trial judge erred in finding T.A. and [***17] M.B. competent to testify, (4) defendant's right to confrontation was denied because his attorney was not allowed to cross-examine T.A. and M.B. in the hearing to determine whether they were competent, (5) the judge abused his discretion by joining the accusation and the indictment and by failing to give an appropriate limiting instruction on the jury's use of "other crime" evidence, and (6) the out-of-court statements of T.A. and M.B. were erroneously admitted. The State cross-appeals, contending that the judge's decision to merge several of the offenses was in error.

II.

We first consider defendant's argument that the testimony of T.A. and M.B. was tainted by the coercive and suggestive interview techniques utilized in obtaining their statements. The judge conducted a lengthy hearing pertaining to this question. We have already described some of the salient facts. We supplement that description here. At the outset, however, we note that the hearing was extensive and involved other

issues as well as that of reliability and taint. We thus recite only those facts essential to our disposition of the issue presented.

We begin by describing Dr. Underwager's testimony. Underwager [***18] first considered Aunt Carol's interview with T.A., which he characterized as leading and coercive. Because Aunt Carol and Uncle Clarence were present at the initial stage of the interview, and were viewed by T.A. as "authority figures," Underwager [*21] observed that there was an "increased likelihood" T.A. would conform his answer to what he believed they wanted him to say. We note that Underwager's understanding of the circumstances surrounding the interview was based upon T.A.'s version and Mason's summary. As we pointed out earlier, Aunt Carol denied much of the coercive techniques described in these accounts.

Underwager's examination of T.A. confirmed his suspicion that T.A.'s statements to Aunt Carol, and to a lesser extent to Detective Blesso-Chiota, were contaminated and unreliable. According to Underwager, T.A. immediately launched into a description of defendant's misconduct, thus suggesting that he had been "primed" by others. Underwager testified that T.A.'s statements were "disjointed" and did not follow "any necessary sequential patterning." Underwager observed that T.A. could not recall events in reverse sequence. The doctor thus concluded that T.A.'s statements were not [***19] the product of his memory or visual images, but instead were based upon "scripts" that he had learned. Underwager also pointed to clinical tests that corroborated his opinion.

Underwager offered a similar opinion respecting M.B. Although Ohmott's interview with M.B. was neither suggestive nor coercive, Mason's interview technique was

found to be substantially flawed. Underwager pointed specifically to Mason's highly leading questions propounded at the [**18] beginning of M.B.'s seven-page statement. Underwager's examination of M.B. confirmed his suspicions. Like T.A., M.B. volunteered information concerning defendant without any prompting. This suggested to Underwager that M.B. was "ready" and "primed," i.e., that he "was aware of what he was expected to [say]." Clinical tests pointed to the same conclusion. According to Underwager, M.B. was not capable of engaging in logical thinking or reasoning, but rather tended to respond to "environmental cues."

The defense's forensic psychologist, Gerald Cook, corroborated Underwager's conclusions with respect to T.A. and M.B. Cooke determined that the statements taken from both alleged victims [*22] were "not consistent with [sound] interviewing [***20] techniques." In reaching his conclusion, Cooke relied upon T.A.'s description of his discussion with Aunt Carol and Uncle Clarence, as well as Mason's summary of the statement he took from Aunt Carol. Cooke also criticized Detective Blesso-Chiota's interview techniques.

Cook found that Ohmott's questioning of M.B. tended to distort M.B.'s ability to recall and recount the relevant facts. As to M.B., Cooke criticized Mason's use of leading questions in taking M.B.'s statement, and his failure to separate M.B. from the presence of his parents. Cooke further noted that Mason used language that was much too sophisticated, and that the questions propounded were too lengthy and complicated.

As we noted earlier, Dr. Witt testified for the State. Witt recounted that T.A. provided a cohesive statement concerning

defendant's activities in response to "open-ended" questions. T.A.'s account of the incidents was "reasonably similar" to his prior statements. Witt believed that T.A. did not perform as well in his interview by Underwager because of Underwager's use of the "quite novel and quite difficult" technique of asking questions in reverse chronological order. Also, the use of videotaping [***21] equipment tended to distort T.A.'s ability to focus. While conceding that T.A.'s "level of suggestibility" was high, Witt stressed that T.A. "resisted" statements that he knew were untrue. Witt pointed to several instances in which T.A. corrected Underwager's statements.

Witt testified that M.B. was "cognitively impaired," and that such an individual was more susceptible to suggestion than "non-cognitively impaired" people. Asked whether M.B. could have been coached and fed the explanation of what had happened with defendant, Witt responded that M.B. was not "smart enough" to remember a well-structured explanation of what had occurred. Witt emphasized that M.B. was quick to resist any attempt Witt made in suggesting responses. For example, M.B. corrected Witt's statement that defendant called him out of class, noting that his teacher always accompanied him to and from defendant's [*23] office. When Witt referred to defendant as "**Krivacska,**" M.B. insisted that he knew him as "Dr. Jim." Witt found that M.B. did not acquiesce in a statement or suggestive question when an event was part of his own experience.

Dr. Kathryn Hall also testified for the State. While conceding the flaws in [***22] Aunt Carol's questioning of T.A. and Mason's questioning of M.B., Hall concluded that these errors did not taint the alleged victims' ability to recall the events in question and to accurately depict such events in their testimony. In reaching this conclusion, Hall considered: "the

conditions that were prevalent at the time of the child's original report of [the] criminal event[,] the circumstances under which the initial report was made[,] how many times the child was questioned[,] the hypothesis [**19] of the interviewers who questioned the child[,] and the kinds of questions the child was asked as well as the consistency of the child's report over time."

With respect to T.A., there was no indication that Aunt Carol knew of, or was biased against, defendant when she initially questioned the alleged victim. Hall also emphasized that T.A. had an independent recollection of the events and that he had resisted many of the suggestions contained in Aunt Carol's questions. She also stressed that, except for the allegation concerning oral sex, T.A.'s description of the events remained consistent over time. Blesso-Chiota asked several leading questions in her interview of T.A., but no [***23] bias against defendant was evident in the questions she propounded. Hall stressed that T.A.'s responses often went "beyond the lead" that was given to him in the questions asked. She also emphasized that T.A. steadfastly resisted suggestions that he believed were incorrect. According to Hall, T.A.'s ability to resist leading questions by Aunt Carol, Blesso-Chiota and Underwager suggested strongly that T.A. "maintained an independent recollection of the events." Because T.A. did not rely upon the questions to inform him of the answers, Hall "very strongly" believed that T.A.'s ability to recall and to testify was not "irreparably tainted" by the interview techniques that had been employed. [*24] Hall opined that T.A.'s answers reflected an independent recollection of the events explored. Hall found that T.A.'s statements had not been "unduly tainted by the questioning and interviewing that had occurred."

With respect to M.B., Hall observed that his initial statements to Ohmott were entirely spontaneous and voluntary. Neither Ohmott nor M.B.'s parents exhibited any bias against defendant. Nor did the questions they propounded contain suggestions relating to what had occurred. However, Hall [***24] was sharply critical of Mason's questioning of M.B. She nevertheless stressed that M.B.'s answers went beyond the cues contained in Mason's questions. The witness concluded that M.B.'s ability to provide an accurate account of the events was not compromised.

The trial judge issued a letter opinion denying defendant's motion to bar T.A. and M.B. from testifying based upon the interview techniques employed. While finding that Carol Ruth's questioning of T.A. was leading, the judge concluded that T.A. was able to provide testimony based upon his independent recollection of the events in question and was not tainted. The judge "likewise [found] no evidence of taint" arising out of Detective Blesso-Chiota's interview of T.A. The judge emphasized that although prior questioning had its suggestive aspects, "the defendant's name was never suggested to T.A. [and] there was no praise, no rewards, [and] no punishment threatened."

As to M.B., the judge determined that the alleged victim's initial disclosure to Ohmott was entirely spontaneous. However, questions propounded by Detective Mason were leading. The judge nonetheless emphasized that Mason had questioned M.B. before taking his [***25] seven-page statement, and that the leading questions asked in the formal statement were merely designed to focus M.B.'s attention on the allegations he had made previously. In any event, both as to T.A. and M.B., the judge found "by clear and convincing evidence that the proffered statements of [the alleged victims]

were reliable and that the investigatory procedures employed [*25] . . . did not have the effect of tainting [their] recollection of the events."

The applicable principles were described in State v. Michaels, 136 N.J. 299, 642 [**20] A.2d 1372 (1994). See also State v. Scherzer, 301 N.J. Super. 363, 464, 694 A.2d 196 (App. Div.), certif. denied, 151 N.J. 466, 700 A.2d 878 (1997). The focus of that decision was the manner in which the prosecution conducted its investigatory interviews with a group of nursery school students who had allegedly been sexually abused by their teacher. We need not describe the circumstances of the investigation in detail. It suffices to note that the children had been interviewed in the presence of one another, they had been cajoled and coerced into making bizarre allegations concerning the teacher's activities, and [***26] otherwise had been coerced in repeated interviews into giving incriminating accounts of the teacher's behavior. Against that background, our Supreme Court observed, "the question of whether the interviews of the child victims of alleged sexual-abuse were unduly suggestive and coercive requires a highly reasoned inquiry into the totality of circumstances surrounding these interviews." Id. at 306. The Court stressed that "special care [must] be taken to ensure [the] reliability [of their description of the events]." Ibid.

Synthesizing principles enunciated in scholarly commentary, see Gail S. Goodman and Vicki S. Helgeson, Child Sexual Assault: Children's Memory and the Law, 40 U. Miami L. Rev. 181 (1985); Diana Younts, Evaluating and Admitting Expert Opinion Testimony In Child Sexual Abuse Prosecutions, 41 Duke L. J. 691 (1991), the Court noted the "variety of factors bearing on the kinds of interrogation that can affect the reliability of a child's statements concerning

sexual abuse." State v. Michaels, 136 N.J. at 309. Among the factors cited as having the potential to undermine the neutrality of an interview [***27] and create undue suggestiveness were "a lack of investigatory independence, the pursuit by an interviewer of a preconceived notion of what has happened to the child, the use of leading questions, and a lack of [*26] control for outside influence on the child's statements, such as previous conversations with parents or peers." Ibid.; see also John E.B. Meyers, The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment, 18 Pac. L. J. 801, 899 (1987) (factors include: (1) whether interviewer believes in presumption of guilt, (2) whether questions asked are leading, and (3) whether interviewer is a trusted authority figure). The Court added that "the use of incessantly repeated questions . . . adds a manipulative element to an interview," and "the explicit vilification or criticism of the person charged with wrongdoing is [a] factor that can induce a child to believe abuse has occurred." Id. at 310.

Citing guidelines adopted by the National Center for the Prosecution of Child Abuse, the Court stated that the interviewer must: (1) "remain 'open, neutral and objective,'" (2) "avoid asking leading questions," (3) "never threaten a child [***28] or force a reluctant child to talk," and (4) "refrain from telling a child what others, especially other children, have reported." Id. at 311. The Court further observed the failure to videotape interviews with child victims provides a potential for the elicitation of unreliable information. Id. at 312 (citing Idaho v. Wright, 497 U.S. 805, 812, 110 S. Ct. 3139, 3145, 111 L. Ed. 2d 638, 650 (1990); State v. Hill, 121 N.J. 150, 168, 578 A.2d 370 (1990); State v. Bethune, 121 N.J. 137, 145, 578 A.2d 364 (1990); State v. R.M., 245 N.J. Super. 504, 516, 586 A.2d 290 (App. Div.

1991); State v. M.Z., 241 N.J. Super. 444, 451, 575 A.2d 82 (Law Div. 1990)).

Finding that "the use of coercive or highly suggestive interrogation techniques [**21] can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events," the Court adopted the following rules. Ibid. A defendant is entitled to a "pretrial taint" hearing once he makes a showing of "some evidence" that the victim's statements [***29] were the product of suggestive or coercive interview techniques. Michaels, 136 N.J. at 320. Once a defendant [*27] establishes that sufficient evidence of unreliability exists, the burden shifts to the State to prove the reliability of the proffered statements and testimony by clear and convincing evidence. Ibid. The ultimate determination to be made is whether, despite the presence of some suggestive or coercive interview techniques, when considering the totality of the circumstances surrounding the interview, the statements or testimony retain a degree of reliability sufficient to outweigh the effects of the improper interview techniques. Michaels, 136 N.J. at 321. The State and defense are entitled to call expert witnesses to offer testimony with regard to the suggestive capacity of the suspect investigative procedures. Ibid. However, the relevance of expert opinion focusing essentially on the propriety of the interrogation should not extend to or encompass the ultimate issue of credibility of an individual child witness. Michaels, 136 N.J. at 321-22. The State is entitled to demonstrate the reliability of the child's statements or testimony by proffering independent indicia of reliability. Michaels, 136 N.J. at 322. [***30]

We hold that the trial judge faithfully adhered to this

analytical framework, and that his ultimate factual findings and conclusions were reasonably supported by the evidence. We first find no sound basis to disturb the judge's findings respecting T.A. In reaching this conclusion, we note that Aunt Carol was a person T.A. would normally turn to in confiding a questionable sexual incident. While Aunt Carol's interview technique did not satisfy the prescriptions that normally attend police interrogations, she was not a law enforcement officer and could not reasonably have been expected to be aware of, and follow, sophisticated interview methodology. Unfortunately, T.A.'s description of the interview markedly differed with Aunt Carol's account, and no findings were made with respect to which of the two versions was accurate. As noted by Witt and Hall, assuming that Aunt Carol's techniques had elements of coercion, there was substantial evidence that T.A. resisted. T.A. exhibited no signs of "post-event and post-recitation [*28] distress." Indeed, it was undisputed that T.A. showed signs of feeling relieved following his disclosures to Aunt Carol.

Detective Blesso-Chiota's interview of T. [***31] A. did not suffer from the same infirmities. The detective made a reasonable effort to gain T.A.'s confidence. Although several of her questions were somewhat leading, many of her inquiries were essentially open-ended. Blesso-Chiota's questions did not evidence a bias against defendant. The judge could reasonably have found that T.A.'s statement was made under conditions likely to elicit truthfulness. Michaels, 136 N.J. at 311.

We next find nothing amiss in the judge's findings with regard to M.B. M.B.'s statement to his grandmother concerning defendant's sexual abuse was essentially spontaneous and volunteered. Ohmott hardly questioned M.B. concerning his allegations. Nothing in the record suggests that the inquiries

she did make were in pursuit of a preconceived notion of what had happened. Likewise, there is no evidence suggesting that Ohmott harbored any bias as to defendant's guilt or innocence. n2 [**22] Nor is there any evidence indicating that she asked leading questions, or that she uttered threats or cajoled the alleged victim, or that she vilified or criticized defendant. In short, the record does not in any way suggest that Ohmott suggested information to M.B. in the course of the interview. [***32]

----------Footnotes----------

n2 Out of the jury's presence, defendant presented evidence indicating that he had been charged with similar criminal offenses in 1986, and had been acquitted. Specifically, a Monmouth County jury found defendant not guilty of aggravated sexual assault, sexual assault and child endangerment. The facts alleged in the earlier case were said to be the mirror image of those alleged by the prosecution in this case. Defendant contended that the victims' families were predisposed to believe him capable of sexually abusing students under his care because of their knowledge of the prior charges. He asserted that the victims' families consciously or subconsciously communicated that bias against him while questioning T.A. and M.B. No direct evidence of such a predisposition was presented, and the judge made no specific finding on this point.

----------End Footnotes----------

[*29] We acknowledge the infirmities in the interview techniques employed by Detective Mason. Mason's decision not to videotape or audiotape the interview is particularly disconcerting because [***33] his meeting with M.B. and his parents took place some time after the Michaels opinion was rendered. n3 Moreover, Mason's use of leading questions

clearly evidenced a preconceived notion of what had transpired between M.B. and defendant. We nevertheless emphasize, as did Witt and Hall, that M.B.'s answers often went beyond the cues contained in Mason's questions. Moreover, M.B. resisted Mason's suggestions, clearly evidencing the fact that his responses were based upon independent recollection of the events.

----------Footnotes----------

n3 The State's experts did not videotape or audiotape their interviews with the alleged victims, apparently because they believed that use of such equipment could create needless anxiety and distort the results.

----------End Footnotes----------

That leads us to defendant's claim that the trial judge erred by admitting, and relying upon, Dr. Hall's expert testimony concerning the question of taint. In support of his argument, defendant asserts that Hall "used an idiosyncratic clinical approach to conclude that T.A. and M.B. were reliable [***34] because they resisted the suggestions" contained in several of the questions propounded. n4 We note that Hall had substantial experience in questioning victims of sexual abuse. Her reliance upon the alleged victims' refusal to bend their answers to meet the suggestions advanced in their interviewers' inquiries would seem to comport with common sense and common experience. In any event, Hall's testimony was of a nature to assist the judge in [*30] understanding whether the victims' statements and trial accounts were reliable or contaminated. See N.J.R.E. 702. We conclude that her testimony: (1) concerned a subject beyond the ken of the average person, (2) pertained to a field of inquiry that was

sufficiently reliable, and (3) fell within the purview of the witness's expertise. State v. Kelly, 97 N.J. 178, 208, 478 A.2d 364 (1984).

----------Footnotes----------

n4 At defendant's behest, several psychologists moved to appear in the role of amicus curiae, contending in their brief that Hall's methodology and conclusions were incorrect and invalid. Another panel of this court denied that application on the ground that it would be unjust to permit the defense to supplement the record without affording the prosecution a similar opportunity. We note that defense counsel was granted great latitude in cross-examining both Witt and Hall and in presenting evidence attacking the validity of their opinions. We are content to decide the issue presented based upon the evidence that appears in the record.

----------End Footnotes----------

[***35] There is no question but that T.A. and M.B. were not ideal witnesses. So too, it [**23] is plain that several of those who interviewed the alleged victims were less than sensitive in the techniques they employed. We are nonetheless entirely satisfied that the trial judge was not wide of the mark in his essential finding that T.A. and M.B. retained their ability to give a full and fair account of what happened to them in their private sessions with defendant.

III.

We turn to the question of the competency of T.A. and M.B. to testify. We again supplement our prior recitation of the facts.

We begin with Underwager's testimony. Underwager

administered a series of tests to determine T.A.'s capacity to testify. The doctor found that although T.A. was able to produce "recognizable versions" of designs, he made a "significant number of errors," some of which suggested "brain dysfunction." T.A. could not produce designs from memory. Clinical tests indicated that T.A.'s performance was "borderline" with respect to his ability to process information, code, and retrieve and store facts. When asked whether the test results "impacted" upon T.A.'s ability to distinguish between fantasy and reality, [***36] Underwager's somewhat equivocal response was:

The specific brain dysfunction that T.A. demonstrates may not be related to those issues that [sic] any direct way. We just don't I don't know enough about the brain dysfunction other than the fact that its [sic], he's been diagnosed as seizure disorder. The main things [sic] for these two tests is that there is indication of brain dysfunction.

Is [sic] also the indication of the difficulty in processing information and that memory abilities. And that's where you have the impact or the effect on the question you are asking me about comprehension of oath and so on. [*31]

As I indicated earlier the ability to have memory is absolutely basic to the cognitive skills required to do that. And here this young lad does give indication of memory deficits. There maybe [sic] a relationship to the specific brain dysfunction and certainly a brain dysfunction does have impact; but, I would not [sic] able to say specifically how that might work.

Underwager nevertheless concluded that T.A. did not have the capacity to comply with the oath to tell the truth as opposed to providing a script of what T.A. believed others wanted to hear.

Underwager [***37] concluded, "given the lad's high level of suggestibility and the level of his cognitive capacities and the difficulty he has in processing information, . . . he is not capable of doing those things as required by law."

Underwager also concluded that M.B. did not have the mental capacity to testify. Because M.B.'s retardation and Fragile X Syndrome rendered him incapable of "being aware of [his] own thinking process, [he] could not be relied upon to know what [] [is] true and what[] [is] false." Based upon tests administered to M.B., Underwager considered that M.B. did not have the "cognitive ability to think, to understand, [and] to be aware of what his behaviors [were]." As an example, Underwager observed that at one point in his interview with M.B., M.B. asked Underwager whether he, M.B., was telling the truth. Like T.A., M.B. was said to lack the capacity "to encode, store and retrieve memory."

Witt disagreed with Underwager's assessment. While acknowledging that T.A. performed poorly in distinguishing truth from falsity in responding to Detective Blesso-Chiota's initial questions, Witt found that T.A. was able to provide a "relatively lengthy and appropriate narrative [***38] [**24] differentiating accuracy from inaccuracy." Witt observed that T.A. could distinguish between the truth and a lie "quite adequately." T.A. understood that one had the duty to tell the truth and that one would be punished for telling a lie.

Witt was "fairly impressed" with M.B.'s ability to distinguish between truth and falsity. M.B. was able to define the word "lie" in general terms. More importantly, M.B. was able to give examples demonstrating the difference between truth and a lie. When told that the walls of Witt's office were green, M.B. responded [*32] that the statement was untrue because

the walls were actually white. M.B. also understood that he was duty-bound to tell the truth, and that he would be punished if he failed in that obligation.

In an effort to ascertain their testimonial capacity, the trial judge questioned both T.A. and M.B. In response to the judge's questions, T.A. explained that the truth was "good" and a lie is "bad." He also explained that if one told a lie one would "get in trouble." T.A. was able to differentiate between truth and falsity in a variety of hypothetical factual settings. For example, the judge asked, "what if . . . you took a cookie out of a cookie [***39] jar and your mother or aunt or your grandmother [asks], who took the cookie out of the cookie jar, and you said I did....Would that be the truth or a lie?" T.A. responded that the answer would be true. The judge next asked, "if you...bump into a lamp...and it [breaks], and your mom or your aunt or your grandmother [asks] who broke the lamp, and you said, I [did not] break the lamp, would that be the truth or a lie?" T.A. responded, "[a] lie, because I did [break the lamp]." Based upon these responses and others, as well as Witt's expert opinion, the judge concluded that T.A. had the requisite capacity to testify as a witness.

M.B.'s response to the judge's questions were more equivocal. At first, M.B. represented that he knew the difference between telling the truth and telling a lie. He then said that he did not know the difference. M.B. thereafter volunteered, "you have to tell the honest truth" because "you could get into trouble . . . [and] go to jail...if you [did] not." The judge then focused on concrete examples to discern whether M.B. actually could distinguish between truth and falsity. M.B. responded appropriately when presented with the [***40] cookie jar, lamp and other scenarios. The judge found that M.B. was capable of distinguishing truth from falsity, understood his

duty to tell the truth, and appreciated the fact that he would be punished if he lied.

Before addressing defendant's substantive arguments, we examine several of his preliminary points. We first consider his [*33] attack upon Dr. Witt's qualifications to give an opinion on a witness's competency. We reject this contention. The record indicates that Witt received his doctorate in clinical psychology in 1976. From 1976 to 1980, Witt taught core clinical courses in Seton Hall's graduate psychology program. Since 1987, he has maintained a full-time practice. While Witt had experience in evaluating mentally handicapped individuals, he admitted that this was not his specialty. Witt had no specific experience dealing with patients afflicted by Fragile X Syndrome.

We recognize the deficiencies in Witt's qualifications. We are nevertheless satisfied that the trial judge properly exercised his discretion in determining that Witt was qualified to testify as an expert witness. The sufficiency of a proposed expert's qualifications is a matter best left to a trial court's [***41] discretion, and is to be reversed only for manifest error. See State v. Moore, 122 N.J. 420, 459, 585 A.2d [**25] 864 (1991) (quoting State v. Ravenell, 43 N.J. 171, 182, 203 A.2d 13 (1964), cert. denied, 379 U.S. 982, 85 S. Ct. 690, 13 L. Ed. 2d 572 (1965)). We perceive no abuse of the judge's discretionary powers here.

We also reject defendant's argument that the trial judge's refusal to permit defense counsel to cross-examine T.A. and M.B. at the hearing to determine their competency to testify violated his right to confrontation. At the pretrial hearing, the trial judge allowed defense counsel to question the alleged victims concerning their ability to communicate, but he denied

the attorney's request to question them as to their ability to understand their duty to tell the truth.

The determination of a witness's competency to testify "is made upon a preliminary examination by the trial court." State v. Walton, 72 N.J. Super. 527, 532, 179 A.2d 78 (App. Div. 1962). It has long been settled "'that the competency of a child to be a witness is a matter for inquiry by the trial judge and rests largely in his discretion.'" [***42] Ibid. (quoting State v. Gambutti, 36 N.J. Super. 219, 223, 115 A.2d 136 (App. Div. 1955)) Thus, the trial judge in this case merely followed settled practice. [*34]

We are satisfied that the Sixth Amendment right of confrontation was not implicated in the judge's preliminary inquiry concerning the competency of the witnesses. In Kentucky v. Stincer, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987), the United States Supreme Court held that the exclusion of a defendant from a hearing held to determine the competency of two child witnesses to testify did not violate the Due Process Clause of the Fourteenth Amendment or the Confrontation Clause of the Sixth Amendment. Stincer, 482 U.S. at 747, 107 S. Ct. at 2668, 96 L. Ed. 2d at 648. The Court reasoned that excluding the defendant from the hearing did not interfere with his opportunity for effective cross-examination of the witnesses in the course of the trial. Id. at 740, 107 S. Ct. at 2664, 96 L. Ed. 2d at 644. As observed by the Court, "the type of questions...asked at the competency hearing [was] easy to repeat on cross-examination at trial." Id. at 741, 107 S. Ct. at 2665, 96 L. Ed. 2d at 644. [***43] The Court further noted that "questions at a competency hearing usually are limited to matters that are unrelated to the basic issues of the trial." Ibid.

While we have found no reported New Jersey opinion dealing

with the precise issue, we note that the decisions of other jurisdictions comport with Stincer's holding that the opportunity to cross-examine witnesses at trial satisfies the right of confrontation, thereby allowing the exclusion of the defendant at a competency hearing. See, e.g., Gardner v. State, 641 N.E.2d 641, 644 (Ind. Ct. App. 1994); See v. Commonwealth of Kentucky, 746 S.W.2d 401, 402 (Ky. 1988); State v. Thompson 427 N.W.2d 266, 270 (Minn. Ct. App. 1988); People v. Morales, 80 N.Y.2d 450, 454, 606 N.E.2d 953, 956, 591 N.Y.S.2d 825 (1992); State v. McMillan, 62 Ohio App. 3d 565, 568, 577 N.E.2d 91, 93 (Ohio App. 1989).

While we recognize that the issue raised here is slightly different, we find controlling Stincer and the other cases we have cited. Although defense counsel was partially barred from questioning the alleged victims at the pretrial competency hearing, [***44] the attorney was granted wide latitude to pursue this subject in his subsequent cross-examination of T.A. and M.B. Moreover, defense [*35] counsel fully availed himself of that opportunity. The attorney's cross-examination was extensive, and all of the relevant circumstances were placed before the jury. We discern no constitutional violation. [**26]

We add for the sake of completeness that the judge's denial of defendant's pretrial motion to examine the alleged victims' school records was not violative of the right of confrontation. A child's school records are confidential, and access to their contents is limited. See N.J.A.C. 6:3-6.4, -6.5; N.J.A.C. 6A:14- 2.9. Under some circumstances, a defendant's right of confrontation may trump a juvenile witness's right of privacy. See, e.g., Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). We assume, therefore, that school records

relevant to the issue of competency of a child witness should be disclosed to a defendant upon a showing of particularized need.

This much conceded, "allowing a defendant to forage for evidence is not an ingredient of either due process or fundamental fairness in the administration [***45] of the criminal laws." State v. R.W., 104 N.J. 14, 28, 514 A.2d 1287 (1986). The Confrontation Clause is not a constitutionally compelled right to discovery in a criminal case. Pennsylvania v. Ritchie, 480 U.S. 39, 52-53, 107 S. Ct. 989, 999, 94 L. Ed. 2d 40, 54 (1987). It does not require disclosure of any and all information that perhaps might be useful in contradicting unfavorable testimony. Ibid.; see also State v. Harris, 316 N.J. Super. 384, 397-98, 720 A.2d 425 (App. Div. 1998).

We are convinced that the trial judge properly balanced the alleged victims' right to privacy with defendant's right of confrontation by examining the school records in camera. This procedure has been recommended by the Supreme Court, see State v. Boiardo, 82 N.J. 446, 467, 414 A.2d 14 (1980), and by this court, see State v. Harris, 316 N.J. Super. at 398; State v. Kennedy, 247 N.J. Super. 21, 34, 588 A.2d 834 (App. Div. 1991); State v. Cusick, 219 N.J. Super. 452, 459, 530 A.2d 806 (App. Div. 1987); State v. McBride, 213 N.J. Super. 255, 271, 517 [*36] A.2d 152 (App. Div. 1986); [***46] United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 563, 483 A.2d 821 (App. Div. 1984); Newark Bd. of Ed. v. Newark Teachers Union, 152 N.J. Super. 51, 62 n.3, 377 A.2d 765 and 4 (App. Div. 1977); State v. Braeunig, 122 N.J. Super. 319, 330, 300 A.2d 346 (App. Div. 1973), in a wide variety of factual settings. The judge correctly applied that procedure here.

Within that context, we find no merit in defendant's claim that

only an expert would know what to look for in the school files of the alleged victims. The judge was fully aware of the factual and legal issues raised, and had the ability to make reasoned decisions concerning what was relevant and what was not. We thus find no constitutional violation.

We now address the pivotal question whether the judge erred by finding T.A. and M.B. competent to testify. N.J.R.E. 601 provides:

Every person is competent to be a witness unless (a) the judge finds that the proposed witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or through interpretation, or (b) the proposed witness is incapable of understanding the duty [***47] of a witness to tell the truth, or (c) except as otherwise provided by these rules or by law.

Thus, every person is presumed competent to testify. State v. Scherzer, 301 N.J. Super. at 463. Disqualification "is the exception to the general rule of witness competency." Ibid. The determination of whether a person is competent to serve as a witness lies within the discretion of the court. State v. R.W., 104 N.J. at 19 (citing State v. Butler, 27 N.J. 560, 602, 143 A.2d 530 (1985); State v. [**27] Gambutti, 36 N.J. Super. at 223).

Our Supreme Court has said that "the broad reliance on the discretion of the trial court and the standards governing individual competency determinations does not change when the proposed witness is youthful." R.W., 104 N.J. at 20; see also State in the Interest of R.R., 79 N.J. 97, 112-13, 398 A.2d 76 (1979). The same rules apply in determining the competency of individuals afflicted by mental retardation or

mental illness. See State v. Scherzer, 301 N.J. Super. at 463. [*37]

Applying these principles, we discern no sound basis to disturb the trial judge's decision. [***48] In reaching this conclusion, we have considered the fact that M.B. apparently fabricated rather freely in portions of his trial testimony. M.B. testified at some length to an imaginary conversation he allegedly had with T.A. at the Center's playground. Defendant emphasizes that this fictitious conversation evidenced M.B.'s inability to distinguish truth from fantasy. The fact remains, however, that both T.A. and M.B. were adjudged to be competent based upon substantial, credible evidence presented at the competency hearing. That M.B. subsequently fabricated an event that in fact did not occur was a matter for the jury's consideration.

IV.

We next consider whether the judge erred by joining the accusation with the indictment for the purpose of trial. It will be recalled that the accusation charged defendant with sexually abusing T.A., and the indictment charged defendant with sexually abusing M.B.

Our procedural rules provide that two or more indictments or accusations may be tried together if, among other things, the offenses charged "are of the same or similar character . . . ." R. 3:7-6; R. 3:15-1(a). A judge may sever joined charges "if for any reason it appears that [***49] a defendant or the State [may otherwise be] prejudiced . . . ." R. 3:15-2. Because the offenses charged in the accusation and the indictment were of a "similar character" and thus satisfied the requisites of the Rule, they were properly joined. The question then is whether

the judge should have granted defendant's motion for a severance based on prejudicial joinder.

Disposition of a motion for a severance pursuant to R. 3:15- 2 is addressed to the sound discretion of the trial court. State v. Laws, 50 N.J. 159, 175, 233 A.2d 633 (1967), cert. denied, 393 U.S. 971, 89 S. Ct. 408, 21 L. Ed. 2d 384 (1968); State v. [*38] Manney, 26 N.J. 362, 365, 140 A.2d 74 (1958); State v. Scioscia, 200 N.J. Super. 28, 42, 490 A.2d 327 (App. Div. 1985); State v. Whipple, 156 N.J. Super. 46, 51, 383 A.2d 445 (App. Div. 1978). Denial of such a motion will not be reversed in the absence of a clear showing of a mistaken exercise of discretion. State v. Rosenberg, 37 N.J. Super. 197, 202, 117 A.2d 168 (App. Div. 1955).

Our courts have said that although separate and distinctive crimes which are the same or similar [***50] in character may be joined for the purpose of trial in the interests of judicial economy, where there exists a real "possibility of prejudice to [a] defendant, a trial severance of the offenses should be granted." State v. Reldan, 167 N.J. Super. 595, 597, 401 A.2d 563 (Law Div. 1979), rev'd on other grounds, 185 N.J. Super. 494, 449 A.2d 1317 (App. Div. 1982). A key factor in determining whether prejudice exists from joinder of multiple offenses "is whether the evidence of [those] other acts would be admissible in separate trials under [N.J.R.E. 404(b)]." State v. Moore, 113 N.J. 239, 274, 550 A.2d 117 (1988) (citing State v. Kent, 173 N.J. Super. 215, 220, 418 A.2d 1322 (App. [**28] Div. 1980); State v. Maddox, 153 N.J. Super. 201, 207, 379 A.2d 460 (App. Div. 1977)); see also State v. Pitts, 116 N.J. 580, 601-02, 562 A.2d 1320 (1989). So posited, we focus our inquiry upon the issue whether the alleged offenses against T.A. would be admissible as evidence in a trial involving the alleged offenses against M.B. and visa versa.

Our evidentiary rules have historically prohibited [***51] admission of evidence of other crimes or wrongs except for limited purposes. Evidence Rule 55, the precursor to N.J.R.E. 404(b), barred the introduction of evidence of other crimes or civil wrongs when offered for the purpose of showing a person's disposition to prove that the person acted in conformity with that general propensity. That policy has been carried over into N.J.R.E. 404(b), which contains language identical to its federal counterpart. See Fed. R. Evid. 404(b). Our current rule provides:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that he acted in [*39] conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

[N.J.R.E. 404(b).]

Our Supreme Court has characterized N.J.R.E. 404(b) as a "rule[] of exclusion" rather than one of "inclusion." State v. Nance, 148 N.J. 376, 386, 689 A.2d 1351 (1997); see also Huddleston v. United States, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988). [***52] The basic principle underlying the rule is that "courts should exclude evidence of other crimes, civil wrongs, or acts . . . when such evidence is offered solely to establish the forbidden inference of propensity or predisposition." State v. Nance, 148 N.J. at 386; see State v. Stevens, 115 N.J. 289, 299, 558 A.2d 833 (1989); State v. Kociolek, 23 N.J. 400, 418-20, 129 A.2d 417 (1957).

We stress that N.J.R.E. 404(b) does not bar other crime or civil wrong evidence in all instances. By its clear terms, the Rule permits admission of such evidence when relevant to prove some fact genuinely in issue. State v. Marrero, 148 N.J. 469, 482, 691 A.2d 293 (1997); State v. Oliver, 133 N.J. 141, 151-154, 627 A.2d 144 (1993); State v. Stevens, 115 N.J. at 300. Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue especially where the prosecution's access to significant information is limited. See Huddleston v. United States, 485 U.S. at 685, 108 S. Ct. at 1499, 99 L. Ed. 2d at 780. Where such evidence tends to make the existence of a material [***53] fact "reasonably likely" it should be admitted if its probative worth outweighs its potential for causing confusion, undue consumption of time or improper prejudice. State v. Marrero, 148 N.J. at 482; see N.J.R.E. 403.

Our Supreme Court has adopted a four-part test in determining the admissibility of other crime or civil wrong evidence. State v. Cofield, 127 N.J. 328, 338, 605 A.2d 230 (1992). Specifically, the evidence must be: (1) admissible as relevant to a material issue, (2) similar in kind and reasonably close in time to the act [*40] alleged, (3) clear and convincing, and (4) of sufficient probative value not to be outweighed by its apparent prejudice. Ibid. (citing Abraham P. Ordover, Balancing The Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a), 38 Emory L.J. 135, 160 (1989) (footnote omitted)).

Our scope of review in addressing determinations on the admissibility [**29] of other crime or civil wrong evidence is relatively narrow. We must review the record in light of the contention advanced, but not initially from the point of view of how we would decide the matter if we were the court of

first instance. The [***54] Supreme Court has emphasized that "the trial court, because of its intimate knowledge of the case, is in the best position to engage in [the] balancing process" required. State v. Ramseur, 106 N.J. 123, 266, 524 A.2d 188 (1987), cert. denied, 508 U.S. 947, 113 S. Ct. 2433, 124 L. Ed. 2d 653 (1993); see also State v. Nance, 148 N.J. at 387-88; State v. Marrero, 148 N.J. at 483- 84; State v. DiFrisco, 137 N.J. 434, 496-97, 645 A.2d 734 (1994), cert. denied, 516 U.S. 1129, 116 S. Ct. 949, 133 L. Ed. 2d 873 (1996). "Only where there is a 'clear error of judgment' should the 'trial court's conclusion with respect to that balancing test' be disturbed." State v. Marrero, 148 N.J. at 483 (quoting State v. DiFrisco, 137 N.J. at 496-97).

These principles have particular pertinence here where we are reviewing a trial transcript consisting of thousands of pages and an equally extensive record of motion hearings. We recognize that a witness's manner may negate the thrust of his printed word, just as it may supply corroboration the record will not show. We are obliged [***55] to accord deference to the determinations of the trial court that are substantially influenced by its opportunity to hear and see the witnesses and to have the "feel" of the case which we, as reviewing judges, cannot enjoy. So viewed, we cannot say that the "trial court's ruling 'was so wide of the mark that a manifest denial of justice resulted.'" State v. Marrero, 148 N.J. at 484 (quoting State v. Kelly, 97 N.J. 178, 216, 478 A.2d 364 (1984)). [*41]

Within this analytical framework, the trial judge could reasonably have concluded that the offenses against both alleged victims were relevant to a material issue in dispute, i.e., defendant's opportunity to commit acts of sexual abuse in his office. Our Supreme Court's decision in State v. Oliver, 133 N.J. 141, 627 A.2d 144 (1993) is controlling. There, the

State claimed that the defendant at various times sexually assaulted four females in his third-floor bedroom of his parents home while other family members were downstairs. The Court held that the sexual assault charges were properly joined because all of the offenses would have been admitted as evidence at a single trial. Id. at 153. [***56] The Court reasoned that "the other-crime evidence would be admissible to show the feasibility of the proposition that defendant could sexually assault women in his room without other household members hearing or seeing anything unusual." Ibid. The Court observed, "that question was clearly a genuine issue in the case, inasmuch as the defense introduced the testimony of various household members that they had not heard any fighting or screaming on the evenings of the alleged assaults." Ibid.

The facts of this case are similar. The offenses were allegedly committed in defendant's office which was situated in a public area of the school. The defense presented numerous witnesses who testified with respect to the accessibility of that office and the ability of those traveling the hallway to have an unobscured view into the room. The feasibility of defendant committing the offenses was one of the critical factual issues. Moreover, the offenses committed were similar in kind and reasonably proximate in time. Plainly, the other-crime evidence had sufficient probative value not to be outweighed by its potential for undue prejudice. And surely, there was clear and convincing evidence [***57] [**30] offered to establish the "other crimes." We conclude that the foundational requisites for admission of the evidence were satisfied.

Once the proponent has demonstrated the admissibility of other crime or civil wrong evidence and the court has engaged

in the balancing process we have described, the jury must be instructed [*42] on the limited use of the proofs actually presented. In the context of criminal trials, our Supreme Court has explained that because "the inherently prejudicial nature of such evidence casts doubt on a jury's ability to follow even the most precise limiting instruction," State v. Stevens, 115 N.J. at 309, the instructions should be formulated carefully to enable the jury to comprehend the fine distinction to which it is required to adhere. State v. Cofield, 127 N.J. at 341. The trial court "should state specifically the purposes for which the evidence may be considered and, to the extent necessary for the jury's understanding, the issues on which such evidence is not to be considered." State v. Stevens, 115 N.J. at 309.

The judge's instructions in this case did not meet the required standard. The judge charged as [***58] follows:

Now there are various offenses in these two different charges against the defendant. I've read them to you. And they're separate offenses by separate counts in these two different charges. The defendant is entitled to have his guilt or innocence separately considered on each count by the evidence which is relevant and material to that particular charge based on the law as I will give it to you.

In other words, if you find the defendant guilty, say you're considering the charges alleged by [T.A.], and you find the defendant guilty of the first question. That doesn't necessarily mean he's guilty of the second and the third.

And by the same token, if you find him not guilty of the first question, that doesn't necessarily mean he is not guilty as to the second and third charge. And the same goes with regard to the allegations of [M.B.]. You treat each charge as to each boy

separately. You treat each count as to each boy separately because they're different counts. [Emphasis added.]

The charge as given did not specifically tell the jury that it could not consider the other-crime evidence to determine that the defendant was predisposed to commit the crimes [***59] charged. Nor did the instructions narrowly focus the jury's attention on the specific use of the other-crime evidence.

We stress, however, that no limiting instruction was requested. It is fundamental in our practice that a claim of error which could have been but was not raised at trial will not be dealt with as would a timely challenge. The reasons are several. It is certainly possible that in the context of the entire trial, the failure [*43] to object signifies that the error belatedly claimed was actually of no moment. Moreover, to rerun a trial when the mistake could easily have been cured on request, would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal. We do not deem it a palliative to explore the thoughts of trial counsel or his pertinent conversations with his now unhappy client. Such inquiries tend to demean the attorney-client relationship with no compensating gain. State v. Macon, 57 N.J. 325, 333, 273 A.2d 1 (1971).

It is certainly arguable that, unlike most cases, defendant here had little to gain and much to lose by requesting a limiting instruction. The charge given by the judge clearly conveyed the principle [***60] that the jury [**31] was prohibited from considering the cumulative impact of the evidence of all the offenses in determining whether a particular charge had been proven. That was the thrust of the instruction to consider each charge separately. The jury faithfully complied with that instruction, acquitting the defendant of one of the charges. See

State v. Moore, 113 N.J. at 276; State v. Manney, 26 N.J. at 366; State v. Scioscia, 200 N.J. Super. at 40-43. Thus, we discern little or no danger that the jury considered the other-crime evidence to find a general propensity on the part of defendant to commit sexual assaults.

An appropriate instruction would have apprised the jury of its right to consider the other-crime evidence in determining the feasibility of the proposition that defendant could sexually assault students in his office without being detected. Even from the prism of afterthought, it is doubtful that such an instruction would have aided the defendant's case, particularly when considered in the light of the charge actually given which conveyed the message that other-crime evidence could not be used for any purpose.

In these [***61] circumstances, we cannot fairly say that the error committed was capable of producing an unjust result. R. 2:10-2. Nor can we fairly say that the failure to request a limiting [*44] instruction was anything but a well reasoned strategic determination. Plain error was not committed.

V.

Defendant's remaining arguments clearly lack merit and do not require extended discussion. R. 2:11-3(e)(2). We offer the following brief comments.

We reject defendant's contention that the grand jury proceedings were tainted. Defendant asserts that the indictment should have been dismissed because the State presented false testimony on the issue of whether M.B. had previously made false allegations of sexual abuse against his cousin Joseph. Defendant also contends that Detective Mason

commented on his exercise of his constitutional right to counsel. We need not describe the convoluted facts pertaining to these contentions. Suffice it to say, if mistakes were made, they were innocent ones, and clearly were not so serious as to warrant the draconian remedy of dismissal of the indictment. See State v. Hogan, 144 N.J. 216, 228, 676 A.2d 533 (1996); State v. Perry, 124 N.J. 128, 168-69, 590 A.2d 624 (1991); [***62] State v. Long, 119 N.J. 439, 478, 575 A.2d 435 (1990); State v. Wein, 80 N.J. 491, 501, 404 A.2d 302 (1979).

We also are unpersuaded by defendant's claim that the alleged victims' out-of-court statements were erroneously admitted. Various witnesses testified with respect to the circumstances surrounding the alleged victims' reports of the incidents. No details were elicited by the State. Defendant's attorney delved into this subject to a much greater extent than the prosecutor in order to demonstrate that the accounts of T.A. and M.B. were unreliable. We perceive no error, far less plain or invited error.

VI.

While we find some of the trial court's decisions on the application of the merger doctrine somewhat problematical, we have no occasion to address the issue further. The State did not object [*45] below. Its cross-appeal was not filed in a timely manner. The issues are wholly academic because the overall sentence would be the same even if we were to intervene and give credit to the State's contentions.

Affirmed.

Decision of New Jersey Supreme Court Denying Petitioner's Application for Certification

State of New Jersey V James J. Krivacska, 785 A.2d 435; 2001 N.J. LEXIS 1361 (NJ 2001)

DECISION WITHOUT PUBLISHED OPINION
ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4022-98 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to Rule 2:12-9.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 9th day of October, 2001.